SUPREME COURT, U. S.

FILED
JAN 30 1976
MICHAEL RODAK, JR., CLERK

NO. 75-1082

In the Supreme Court of the United States

OCTOBER TERM, 1975

LOUISE KNIGHT, PATRICIA KNIGHT, wife of HARRISON L. KNIGHT, JR.,
Petitioner

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,
Respondent

versus

HARRISON L. KNIGHT, JR., and PATRICIA KNIGHT,
Petitioner

JOAN STEVENS,
Petitioner

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN J. CUMMINGS, III
200 Alison House
416 Gravier Street
New Orleans, Louisiana
Attorney for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

INDEX

	Page No.
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3-6
Reasons for Granting the Writ	6-31
Conclusion	32
Certificate	32

TABLE OF CONTENTS

Law Review, Texts and Statutes

Page No.

20 Am Jur. 545 26

81 A.L.R. 2d, 1287 26

Berbo, Evidence, Sec. 648 26

318 C.J.S. 1070 26

Federal Rules of Civil Procedure, Rule 52 18

Federal Rules of Civil Procedure, Rule 59 16

Federal Rules of Evidence, Rule 608 27

Holtzof, Federal Procedure, Vol. 3 16

Louisiana Civil Code Article 2315 16

Cases

Allen v. Large, 239 S.W. 2d 225 (Ky., 1951) 14

American Cas. Co. v. Lennox, 169 So.2d 707, 4 Cir. (La., 1964) 26

Biggs, v. Toone, 244 S.W. 2d 443 (Ky., 1951) 14

Chopin v. Levy, 125 So. 142 (La. 1929) 6

Cases (Continued)

Page No.

Churchill v. Texas Pacific R.R., 154 La. 726, 92 So. 314. 6

Commercial Credit Corp. v. Pepper, 187 F.2d 71 (5 Cir., 1951)..... 15

Daniels v. Central Truckway System, 253 S.W. 2d 1 (Ky., 1952)..... 14

Davis v. Bankston, 192 So. 2d 614 La. App. (3 Cir., 1966)..... 26, 27

Daull v. N.O. Rwy. & Light Co., 147 La. 1012, 86 So. 477 (La., 1920)..... 6

Fort Worth & Denver Rwy. Co. v. Roach, 219 F.2d 351 (5 Cir., 1955)..... 15

Gasoline Products v. Champlin Co., 283 U.S. 494, 51 Sup. Ct. 513, 75 L.Ed. 1188 (1931)..... 16

Gibbs v. Tomlinson, 362 F.2d 394, (5 Cir., 1966)..... 19

Gorman v. Duke, 217 So. 2d 503 (La., 1963)..... 26

Hopkins v. Coen, 431 F.2d 1055 (6 Cir., 1970)..... 13

Houston Coca-Cola Bottling Co. v. Kelly, 131 F.2d 627 (5 Cir., 1942)..... 15

Hutton v. Norfolk & Western R.R. Co., 28 F.2d 874 (6 Cir., 1928)..... 15

Cases (Continued)

Page No.

Kosh v. Baltimore & O.R. Co., 28 F.2d 872 (6 Cir., 1928)..... .15

Lansburg & Bros. Inc. v. Clark, 75 U.S. App. Dist. Ct. 339, 127 F.2d 331 (1942)..... 13

Lintz v. Metropolitan Life Ins. Co., 428 F.2d 36 (5. Cir., 1970)..... 19, 25

Martin v. Payton, 20 F.R.D. 200..... 14

Malone's Ex's v. Chesapeake & O. Rwy., Co., 249 Ky. 832, 61 S.W. 2d 876 (1933)..... 14

Pugh v. Luft City Excursion Co., 177 F.2d 399 (6 Cir., 1910)..... 13

Reeves v. U.S., 445 F.2d 1303 (5 Cir., 1971)..... 17,18,25

Roller v. Cormier, 192 So. 2d 568 (La.App.) 3 Cir., 1966..... 26, 27

Smith v. Southern Nat'l. Life Ins. Co., 134 So.2d 337 (La., 1961)..... 26, 27

U.S. v. Gypsum Co., 333 U.S. 364, 68 S.Ct. 523, 92 L.Ed. 746 (1948)..... 19

Vidrine v. Kansas City Southern R.R., 466 F.2d 1217 (5 Cir., 1972)..... 15

Cases (Continued)

Page No.

Wall v. Van Meter, 311 Ky. 198, 223 S.W. 2d, 734, 20 A.L.R. 2d 272 (1949)..... 14

Whiteman v. Pitrie, 220 F.2d 914 (5 Cir., 1955)..... 15

IN THE
SUPREME COURT OF THE UNITED STATES

NO.

LOUISE KNIGHT, PATRICIA KNIGHT, wife of
HARRISON L. KNIGHT, JR.,
Petitioner

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,
Respondent

versus

HARRISON L. KNIGHT, JR., and PATRICIA KNIGHT,
Petitioner

JOAN STEVENS,
Petitioner

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on August 19, 1975 and the denial by the said Court of the petition for rehearing on September 24, 1975.

CITATION TO OPINIONS BELOW

The judgment of the United States District Court for the Eastern District of Louisiana, New Orleans Division, is reproduced in the Appendix. The opinions of the United States Court of Appeals for the Fifth Circuit are reproduced in the Appendix and are reported at F. 2d.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 19,1975. A timely Petition for Rehearing was filed and rehearing was denied on September 24, 1975. The jurisdiction of this Court was invoked under 28 U.S.C. 1254(1). The jurisdiction of the District Court was invoked under the diversity jurisdiction of the United States District Courts.

QUESTIONS PRESENTED

I. Is not the award of damages to one innocent guest passenger and not another innocent guest passenger materially inconsistent and/or incongruous and should not this verdict be set aside?

II. When the decision of a jury finding contributory negligence is so unsupported by the evidence as to indicate that the jury was motivated by other factors should not the verdict be set aside and a new trial granted?

III. Is not the testimony of an agent of the defendant relative to his attempts to have a traffic citation "fixed" admissable evidence?

IV. Does not the Fifth Circuit procedure which denies an appellant the right to oral argument deny that appellant's Constitutional right to the due process of the law?

STATUTES INVOLVED

Louisiana Civil Code Article 2315.

STATEMENT OF THE CASE

On May 15,1973, Patricia Knight, wife of Harrison L. Knight, was the operator of a Volkswagen automobile in the City of Covington, traveling along Jahncke Boulevard, with two passengers, Mrs. Louise Mae Knight and Mrs. Joan Stevens. While traveling on Jahncke Boulevard, the Volkswagen automobile stopped at a four-way stop sign on Jahncke Boulevard at 19th Street. Behind her at that stop sign was a truck owned by the respondent, South Central Bell Telephone Company, and was operated by its agent and employee, Mr. Bruce Cleland. After stopping, Patricia Knight continued on Jahncke Boulevard, and upon reaching the corner of Jahncke Boulevard and 19th Street, she slowed, and signalled to make a left turn. Prior to making the left turn, and while her automobile was still in the right lane of traffic (Tr. 182), not having crossed the center line, she was struck from the rear by a truck owned and operated by the respondent, South Central Bell Telephone Company (Tr. 156, 182). Prior to impact, Mr. Cleland had looked away from the direction of travel at a man to his left who was raking leaves (Tr. 425, 426).

After Mr. Cleland looked away from the direction of travel, he hit the rear end of the Knight Volkswagen. Mrs.

Stevens, one of the guest passengers, was seated in the right front seat. Upon impact, her head hit the Volkswagen front windshield with such an impact as to knock the glass out (Tr. 155, 156). Mrs. Stevens, as a result of this injury to her head, suffered a loss of balance due to the severe trauma to her middle ear (Tr. 158). She experienced black-outs and periods of unconsciousness (Tr. 158), for which she sought medical attention and for which she was treated. She sustained injuries as a direct result of the impact of the truck owned by South Central Bell Telephone Company and operated by Mr. Bruce Cleland (Tr. 157). Also in the automobile with Mrs. Joan Stevens was Mrs. Louise Mae Knight, referred to as Louise Knight and Mae Knight at various parts of the proceedings. Mrs. Louise Mae Knight was seated in the rear of the Volkswagen at a distance of less than three feet from the point of impact. As a direct result of the impact, Louise Mae Knight was caused to suffer from osteoarthritis (Tr. 272). Her physician testified that he had seen her forty-five times in the last eighteen months (Tr. 284) and has been treating her for pain related to the accident. She had done work as a seamstress, but since this accident has been unable to perform that or any other type of work (Tr. 131).

The driver of the automobile, Patricia Knight, was not to escape this accident without severe injury. As is evidenced by the special interrogatories to the jury, it was the decision of the jury that the injuries to Patricia Knight were directly related to the accident and furthermore, the negligence of South Central Bell Telephone Company was the proximate cause of these injuries (Tr. 525). At the trial the injuries to Patricia Knight were described as injuries to the right arm (Tr. 183), right elbow (Tr. 183), coupled with injuries to the neck and physical pain (Tr. 192), plus extreme sensitivity to cold (Tr. 207). As a part of her

treatment to her neck, she was instructed by Dr. Caillouet, one of many treating physicians, to wear a plastic cervical collar for a period of three months (Tr. 188). Eventually, Dr. Donald Richardson would operate on her elbow (Tr. 199) and move the ulnar nerve out of the ulnar groove (Tr. 363) in an effort to treat her for complaints of heaviness and sensitivity. This operation would leave a scar (Tr. 202) of which Mrs. Knight is still conscious.

Mrs. Knight, as stated, has experienced heaviness of the arm and a loss of feeling in the little finger and ring finger of the right hand. Prior to the accident she had successfully operated a beauty shop, but due to the heaviness and numbness, was required to close down the shop (Tr. 194).

On August 15, 1973, Louise Knight and Patricia Knight filed suit against South Central Bell Telephone Co. in the United States District Court for the Eastern District of Louisiana, which case bore Docket No. 73-2165. On May 9, 1974, Mrs. Joan Stevens filed suit against the same defendant in the same court, which litigation bore Docket No. 74-1271. After these cases were transferred and consolidated, trial was held on Monday, December 9, 1974, and Tuesday, December 10, 1974, before a jury presided over by the Honorable Jack M. Gordon, Judge.

After a trial of the merits, the jury returned their verdict, which indicated: first, that they found that the defendant, South Central Bell Telephone Company, was negligent. Secondly, that the negligence of South Central Bell Telephone Company was the proximate cause of any injuries and damages to Mrs. Patricia Knight, Mrs. Louise Mae Knight, but not to Mrs. Joan Stevens; and thirdly,

that Mrs. Patricia Knight was contributorily negligent (Tr. 525).

A motion for new trial was timely filed in the United States District Court for the Eastern District of Louisiana and was denied. Plaintiffs then sought their judicial redress through an appeal to the United States Court of Appeals for the Fifth Circuit. This case was placed on the summary docket and the petitioners were left without any opportunity for oral argument. The decision of the District Court was affirmed on August 19, 1975 with the rehearing denied on September 24, 1975. Petitioners now seek their final appeal to remedy the incongruous verdict.

REASONS FOR GRANTING THE WRIT

I.

The law of the State of Louisiana, as exemplified in the decision of *Chopin v. Levy*, 125 So. 142 (La., 1929), per Janvier, Judge, is that a guest passenger cannot be deprived of her right to recover. In the *Chopin* case, supra, Judge Janiver, wrote:

> Since Mrs. Chopin was a guest passenger in the Dela Vergne car, and had nothing to do with the operation, and had no authority over its driver, she cannot, as a matter of law, by the negligence of DelaVergne, be deprived of her right to recover from Levy, unless the circumstances were such that she could be charged with independent negligence on her own part. Accord: *Churchill v. Texas Pacific R.R. Co.*, 154 La. 726, 92 So. 314, and *Daull v. N.O. Rwy. & Light Co.*, 147 La. 1012, 86 So. 477.

In the Daull decision, there was injected the possibility that a guest passenger may not be able to recover if there was an acquiescence on his part in the reckless driving of another, but that is easily discounted in the case presently before the Court, as there was no evidence presented at the trial of any contributory negligence on the part of Joan Stevens or Louise Mae Knight. Yet, because of some other motivation, the jury awarded damages to Louise Knight, a guest passenger in the rear seat of the Volkswagen, and not to Joan Stevens, in the front seat. Dr. Newman testified concerning the injuries she received as a direct result of the accident (Tr. 291):

Q. Now, in the course of your practice, Doctor, did you have occasion to examine Mrs. Joan Stevens?

A. I did.

Q. And did you treat her as a result of this accident?

A. Yes.

Q. Would you review for the jury your initial visit, examination, course of treatment, and you may refer to your notes.

A. Okay, I first saw Mrs. Stevens May 17, 1973. She had been seen in my absence by my associate on the 16th–on the day of the accident. Apparently, Dr. Caillouet got X-rays on the patient at the time, which I think I have copies of. Yes, I do. There were skull X-rays and

BLEED THI

cervical spine X-rays which were both considered to be within normal limits. Dr. Caillouet referred the patient to me the next day. I'm not positive what medication, if any, he gave her at the time, but any any rate, I saw her on the next day, which was the 17th, also through the emergency room.

I did a complete examination of the patient, at which time I did a complete neurological examination of the patient and found it to be essentially negative, but the patient was compplaining of rather severe headaches. Shall I go on?

Q. Yes, I wish you would. It might facilitate the testimony.

A. We gave her non-narcotic type pain reliever as well as anti-nausea compound both intramuscularly, which is by hypodermic needle. I saw the patient again on May 29th which was twelve days later and she was still complaining of headaches and dizziness and she apparently was bruised at the time, though at the time of the automobile–but, there was no blue splotches apparently on her body, but she was tender at this time. At this time, on the 29th, she complained of back pain. The remainder of the history was not very contributory.

Again, a physical examination was essentially negative, and on examining her now, a straight leg raising test was positive and at least thirty degrees bilaterally, and she complained of some

neck pain at the time. So it was apparent to me that maybe she did have a lumbrosacral strain at the time, as well as some strain of her neck, and she was given muscle relaxants and referred to a physical therapist and was seen again on June 5, 1973, and she complained, at that time, mostly of backaches, and was given a valium which was a muscle relaxant and tranquilizer combination and she was also given an anti-inflamatory agent.

Q. When did you next see her,sir?

A. Okay. One week later, on June 12th, she had a history of having passed out or having had a single episode, at that time, and she was referred to Dr. Donald Richardson, who was a neurosurgeon, for a work-up, and I saw her again on July 3rd, at which time her sumptomology was better and she was told to continue with Dr. Richardson's regime and to see me in about a month's time.

Q. When you saw Her on July 3rd, were her symptoms any better?

A. Yes, they seemed to be better.

Q. Would you review that note.

A. I'm sorry, had not. She had not gotten much better.

Q. And that's why you sent her to Dr. Richardson?

A. That's correct.

Q. By the symptoms, you're referring to her headaches?

A. Her headaches, her neck pain and what have you. I thought that her back was probably slight better, cut her headaches and dizziness and neck pain had not gotten better.

Q. What was she complaining about?

A. She was complaining of burning in her neck and back, and even though I don't state it, but headaches and dizziness again, and she was given some anti-inflamatory agent and told to continue to see Dr. Richardson on schedule.

She was last seen, according to this, on August 6, 1973. I don't know if that's the last time I saw her, or if she came back since the report."

The jury also heard from Mrs. Stevens relative to the impact of her head with the windshield. At page 155 of the transcript, she was asked:

Q. I see, did you hit the windshield very hard?

A. Well, I knocked it out of the rim that it's in.

* * * * * * *

Q. Did you experience pain anywhere else?

A. Muscles, all over my back.

* * * * * * * *

Q. I see, did you seek medical attention after the accident?

A. Yes.

Q. Would you tell the jury the name of the doctor to which you went to visit?

A. Dr. Caillouet.

Q. Did he examine you?

A. Yes.

Q. How many times did you see Dr. Caillouet?

A. Two.

Q. Who then did you see?

A. Dr. Newman.

Q. What complaints did you make to Dr.Newman?

A. Headaches and my back was hurting.

Q. Did Dr. Newman treat you?

A. Yes.

Q. In what way? In which manner did –

BLEED

A. He sent me to the Bogalusa Health Center for physical therapy.

Mrs. Stevens, in her testimony, indicated the extreme amount of physical pain which she endured. She testified (Tr. 153):

Q. I see. What parts of your body do you say were injured in this accident?

A. My head.

Q. Anything else?

A. I had some back strain.

Q. Has that cleared up?

A. Yes.

Q. Alright. When did you first experience back pain following this accident?

A. Well, I was in the bed for five days with every muscle in my back in knots.

The testimony was uncontroverted that Mrs. Joan Stevens was thrown against the front windshield of the Volkswagen and that she struck her head, experiencing severe headaches, dizziness and blackouts, which she had not experienced prior to the accident. It is therefore apparent that for some personal reason, the jury did not make an award to Mrs. Joan Stevens and that their decision was not based on the evidence presented to them during the course of the two days of trial. Mrs. Joan Stevens

ED THROUGH

has sought a new trial in conformity with the Federal Rules of Civil Procedure and cites as her authority *Hopkins v. Coen*, 431 F.2d 1055, 6 Cir., 1970:

> By general rule, the granting of a new trial is a matter purely within the discretion of the trial court and it will not be reviewed. See *Pugh v. Luft City Excursion Co.*, 177 F.2d 399, 6 Cir. 1910.
>
> However, where verdicts in the same cases are inconsistent on their faces, indicating that the jury was either in a state of confusion or abused its power, a motion to alter or to amend the judgment for a new trial, or for relief from the judgment, if timely made, is not discretionary.

As in *Lansburg & Bros., Inc. v. Clark*, 75 U.S. App., Dist. Ct. 399, 127 F.2d 331, at page 333, 1942:

> Were this court able to divine that one of the judgments in these consolidated cases was intelligently rendered by the jury, we should remand only the ambiguous one for retrial.

Following the language of Circuit Judge Celebreeze in the *Hopkins v. Coen* case, supra, an award to Louise Knight and not to Joan Stevens, two people who received injuries in the same accident, indicates that the jury was either in a state of confusion, or abused its power. The remedy which plaintiffs-appellants seek is a new trial at least on the issues of damages to Joan Stevens, as petitioners submit that the issues are separable and only that inconsistent award,

i.e., that to Joan Stevens, requires review. As stated in Holtzof, Federal Procedure, Vol.3, Sec. 1304:

> If issues are framed for the jury and the issue as to which a new trial is required is separate from all other issues, and the error requiring a new trial does not affect the determination of any other issue, the scope of the new trial may be limited to the single issue.

An important and well-reasoned decision in this area is *Martin v. Payton*, 20 F.R.D. 200, wherein the Court, quoting from the case of *Smith v. Weber*, 282 S.W.2d 346, Ky., stated:

> *Where a verdict is materially inconsistent or incongruous, it should, as a rule, be set aside and a new trial granted.* This is upon the idea that the verdict is contrary to the evidence and the law for which a new trial is authorized by C.R. 59.01 (6), which is like Sec. 340(6) of the Civil Code of Practice. *Malone's Ex's v. Chesapeake & P. Rwy. Co.*, 249 Ky. 832, 61 S.W. 2d 876. In returning such a verdict, the jury has not accepted and applied the law as contained in the instruction. *Daniels v. Central Truckaway System*, Ky., 253 S.W. 2d 1. Upon this ground, we have reversed judgments, resting upon verdicts like the one at bar where the jury found the defendant liable in damages but limited the award to medical expenses. *Wall v. Van Meter*, 311 Ky. 198, 223 S.W. 2d 734, 20 A.L.R. 2d 272 *Allen v. Large*, 239 S.W. 2d 225; *Biggs v. Toone*, Ky. 244 S.W. 2d 443. (Emphasis ours)

The court further continued that in conformity with *Kosh v. Baltimore & O.R. Co.*, 6 Cir., 29 F.2d 872, and *Hutton v. Norfolk and Western R.R. Co.*, 6 Cir., 28 F.2d 874, "where damage awards are grossly inadequate the matter of a new trial addresses itself to the judicial discretion of the court". It is upon that discretion which the plaintiffs-appellants call in this appeal.

The United States Court of Appeal for the Fifth Circuit, has not been silent on this area, and made its pronouncement clearly on point in *Vidrine v. Kansas City Sou. R.R.*, 466 F.2d 717, 5 Cir., 1972, wherein the court stated at page 1221:

> Though the Supreme Court has never clearly so held, the Fifth Circuit is now firmly committed to the doctrine stated in *Whiteman v. Pitrie*, 5 Cir., 1955, 220 F.2d 914, 919:
>
> > A simple restatement of the condition of this court is as follows: In reviewing a motion for new trial based on the ground of the inadequacy or the excessiveness of the verdict, as well as one based on the grounds that the verdict is against the weight of the evidence, the rule applies that * * * an abuse of discretion is an exception to the rule that the granting or refusing of a new trial is not assignable as error. *Commercial Credit Corp. v. Pepper*, supra, 187 F.2d 771; *Houston Coca-Cola Bottling Co. v. Kelly*, 5 Cir., 131 F.2d 627, 628; *Fort Worth & Denver Ruy. Co. v. Roach*, 5 Cir., 219 F.2d 351.

> Rule 59(a), Federal Rules of Civil Procedure, permits the granting of a new trial to all or any of the parties on all or any part of the issues. It is, however, well settled that a new trial on part of the issues 'may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice; *Gasoline Products v. Champlin Co.*, 9131, 283 U.S. 494, 500 Sup. Ct. 513, 75 L.Ed. 1188.

One guest passenger cannot be denied the right to recover, while another guest passenger is granted that right. Secondly, the court must grant a new trial where the verdict is inconsistent. Clearly, any consideration as to the damages to be awarded is to be considered only after a thorough consideration of the pain and suffering, embarrassment and humiliation of each respective plaintiff, all in accord with the paramount concept of Louisiana substantive tort law, that "Every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it". LCC 2315.

Joan Stevens was an innocent guest passenger. She contributed in no way to her injuries, and she received severe damages as a result of a blow to the head. In spite of this uncontroverted testimony, the jury totally disregarded Joan Stevens and, therefore, a new trial is required, pursuant to the Federal Rules of Civil Procedure.

In spite of the overwhelming evidence to the contrary, the Fifth Circuit dismissed the claim of Joan Stevens by stating:

> Concluding, however, that there existed no causal relationship between the accident and the injuries allegedly sustained by the second guest passenger, the jury declined to award her damages . . . After a careful review of the record we cannot conclude that the jury findings are unsupported by competent evidence.

In this statement it is obvious that the Court failed to review the record nor properly analyzed the weight of evidence presented and, therefore, a new trial is required to remedy this injustice.

II.

If a jury verdict is inconsistent or incongruous on its face,it may be set aside. Similarly, the petitioners would suggest that where the verdict is not in conformity with the overriding weight of evidence, it should be set aside and a new trial granted. The principle that a reviewing court will not review a finding of fact of a case is well established. Equally well established is that this rule does not apply to facts found under an erroneous view of controlling legal principles. Further, Federal Courts have stated that a finding of fact is clearly erroneous if it is without substantial evidence to support it,or if the district court misapprehended the affect of the evidence. In *Reeves v. U.S.*, 445 F.2d 1301, the Court applied this rule when it found that there was no evidence to support the lower court's finding that the physician in question was not negligent in his treatment of the plaintiff's child. In the present case, we have shown that there is insufficient evidence to support the finding of contributory negligence on the part of Mrs. Patricia Knight by the error

made by the court in refusing to allow the truck driver's testimony into evidence. We contend that due to this lack of substantial evidence, this case falls within the stated exception of the clear erroneous rule of the Federal Rules of Evidence, Rule 52:

> Rule 52.
> FINDINGS BY THE COURT
>
> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

In the decision of *Reeves v. U.S.*, supra, the court, while directing its attention to a Rule 52 advisory jury, wrote:

> A review of the lower court's finding is, of course, governed by Federal Rule of Civil Procedure 52(a), and this court cannot set aside those finding unless they are clearly erroneous. *A trial court's findings of fact is clearly erroneous if it is without substantial evidence to support it*, or the district court misapprehended the affect of the evidence. *Lintz v. Metropolitan Life Ins. Co.*, 428 F.2d 36, 39, 5 Cir., 1970; *Gibbs v. Tomlinson*, 362 F.2d 394, 297, 5 Cir., 1966. Likewise, a finding of the district court is clearly erroneous in 'when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed'. *U.S. v. Gypsum Co.*, 33 U.S. 364, 395, 68 Sup. Ct. 525, 92 L.Ed. 746, 1948. This court, having steeled itself into the task of reviewing all of the evidence introduced in both trials which was considered by the lower court in reaching its determination, is left with a definite and firm conviction that a mistake indeed has been committed. (emphasis ours)

Similarly, it is the position of the petitioners that on a review of all of the evidence presented to the trial court, the court can be left with nothing short of a firm and definite conviction that a mistake indeed has been committed. There was no evidence presented at the trial of this matter which would indicate any contributory negligence on the part of Patricia Knight. The verdict was inconsistent with the evidence presented and was apparently motivated by some other concern.

Mr. Cleland, the driver of the truck, testified from an accident report made shortly after the accident:

Q. Is that your signature that appears at the bottom of that report?

A. That's my signature.

Q. What's the date on that report?

A. May 16, 1973.

Q. Will you read the report to the jury?

A. I was driving down South Jahncke Avenue. I stopped at a four-way stop sign on 19th Avenue. I left the stop driving South. I glanced to the left at a man working close to the road. I looked back into the road and a car was stopped in the road just past 18th Avenue. I hit my brakes, then I hit the car. I got out of my truck and checked on the occupants of the other vehicle and I called the police.

Q. And your signature appears below that?

A. Right. (Tr. 434)

He stated that prior to the accident, he saw the vehicle stopped in the road in front of him. Mr. Dewey, an employee of South Central Bell Telephone Company, who seemed to have happened upon the accident, testified at Tr. 445:

Q. Did you talk to Mr. Cleland at the scene of the accident as to what caused the accident?

A. Yes.

Q. And what did he tell you?

A. He told me that he just didn't see the vehicle stop.

Mrs. Joan Stevens, Mrs. Patricia Knight and Mrs. Louise Mae Knight all testified that they were moving down Jahncke Boulevard and, at a point coming to 18th Street, Mrs. Patricia Knight signaled for a left turn, put her arm out indicating that she was slowing down, and then she was hit from the rear by a truck driven by Bruce Cleland. There is no testimony in the record which indicates that Mrs. Patricia Knight in any way contributed to the accident, but merely that she prepared to make a left turn off Jahncke Boulevard onto 18th Street.

Mr. Cleland testified:

Q. All right. Now, would you relate to the court and the jury what happened as you approached 18th Avenue?

A. Well, I took off from the stop sign and than as I drove down the road, I looked at the car ahead of me and then I saw someone on the left over here, so I glanced over that way to notice what was going on, you know, and then when I glanced back, the car in front of me was stopped. (Tr. 404-405)

Mrs. Patricia Knight testified (Tr. 182):

Q. Which lane were you in?

A. In the right-hand.

Q. Was any part of your vehicle on the other side of the center line?

A. No sir.

Mrs. Louise Mae Knight confirmed that the car was in the proper lane of traffic and was not backing but attempting to make a left turn when she testified:

Q. How far from that intersection did the accident occur?

A. I would say about two, three car lengths.

Q. I see. Had Mrs. Knight slowed her vehicle?

A. She was slowing, but she hadn't stopped (12) nor hadn't turned.

Q. Did you notice any indication that she intended to turn left?

A. Yes sir.

Q Tell the jury what you saw?

A. Well, she had her hand out to the left and she had her flicker lights on turning to the--was turned to the left.

Q. By "flicker light", what do you mean?

A. That was her turning lights, you know, to go

in–

Q. The indicator?

A. Uh-huh.

Q. And was it blinking?

A. Yes sir.

Q. Was it clicking?

A. Yes, it was.

* * * * * * * *

Q. I see. Now, the vehicle that you were in, to you knowledge prior to the collision, did it ever (13) leave the right-hand lane of traffic?

A. No, it didn't.

Q. Did it ever cross the center line?

A. It knocked it further over to the right about three lengths down.

Q. When it was struck, it was in the right-hand lane?

A. Yes, sir, it was.

Q. And it was on the right side of the center line?

A. Yes, sir.

Corresponding testimony was given by Mrs. Joan Stevens (Tr. 154).

At numerous points during the trial, counsel for defendant questioned witnesses about the position of the Knight automobile. These witnesses testified that at the point at which the vehicle came to rest, it could not have turned the corner at 18th Street, it was in fact beyond the intersection. Naturally, the Volkswagen was pushed beyond the point of impact because here a large truck going 25 miles per hour hit a slow-moving Volkswagen. Each petitioner, in her turn, testified of the impact of the collision and of the force with which the car was pushed forward.

Mrs. Patricia Knight testified:

Q. Where did the Volkswagen come to rest following the accident?

A. I can't be absolutely sure about the distance, but we (sic) were past the turnoff to 18th Avenue, this intersection that I was going to turn at. (Tr. 186)

Mrs. Joan Stevens testified:

Q. Where did the Volkswagen come to rest after the accident, if you know?

A. Past the intersection (Tr. 156)

Mrs. Knight, as has already been discussed, was temporarily unconscious after the accident.

From all of the testimony presented at trial, it is ap-

parent that Bruce Cleland looked away from his direction of travel while traveling at a speed of 25 miles per hour and rear-ended the Knight automobile. There is no evidence of any contributory negligence on the part of Patricia Knight.

The jury, during the course of this trial heard consistent statements from Mrs. Joan Stevens, Mrs. Patricia Knight, Mrs. Louise Mae Knight and Mr. Bruce Cleland which indicated that the Knight automobile was either slowing or stopped in the right lane of traffic preparing to make a left turn from Jahncke Boulevard onto 18th Street, and that Mr. Bruce Cleland, the operator of a truck driving down Jahncke Boulevard at approximately twenty-five miles per hour, looked to his left, away from the direction of travel, and then did not see Mrs. Knight and smashed into the rear end of the Knight Volkswagen, causing the injuries made the basis of this suit.

The jury did not hear any testimony which would indicate that Mrs. Patricia Knight in any way contributed to this accident. A decision by the jury which found contributory negligence on the part of Mrs. Patricia Knight, absent any substantial evidence to that effect, would seem to satisfy the doctrine earlier enunciated in *Reeves v. U.S.*, supra, and *Lintz v. Metropolitan Life Ins. Co.*, supra, both decisions of the United States Court of Appeal for the Fifth Circuit, wherein that court wrote:

> A trial court's findings of fact is clearly erroneous if it is without substantial evidence to support it...

Wherefore, the finding of contributory negligence on the part of Mrs. Patricia Knight by the jury was in error, and a new trial should be granted.

III.

The District Court committed error in failing to allow the testimony of the truck driver, Bruce Cleland, regarding his "fixing" of the traffic violation to be heard by the jury. In accordance with the decision of *Gorman v. Duke*, 217 So. 2d 503 (La., 1963), the Fourth Circuit Court of Appeal, per Judge Johnson, reversed the decision of the lower court. Speaking for a unanimous court, he quoted from Judge Hall in *Smith v. Southern National Life Ins. Co.*, 134 So.2d 337 (La., 1961):

> However, it has come to the attention of the courts of other states on numerous occasions, and almost without exception, those courts have held that the plea of guilty be the accused in a criminal prosecution is admissable against him in the subsequent civil action arising out of the same offense as his deliberate declaration or admission against interest. See 20 *Am.Jur.* at 545, *Berbo, Evidence*, Sec. 648; See also, 318 *C.J.S.*, at 1070, *Berbo, Evidence*, Sec. 300(b); See also: A comprehensive annotation covering the whole subject matter together with an exhausting collection of authorities in 81 A.L.R. 2d 1287-1319 . . .This case is cited with approval in *Roller v. Cormier*, La. App., 129 20 2d 568; *Davis v. Bankston*, La. App., 192 So.2d 614; *American Casualty Co. v. Lennox*, La. App., 169 So.2d 707.

A similar result was reached by the Third Circuit Court of Appeal for the State of Louisiana in the above cited case of *Roller v. Cormier*, supra, in which a unanimous court, speaking through Judge Fruge', at 572 of this decision, while addressing itself to the defendant, Cormier, wrote:

> With benefit of counsel, Cormier entered a plea of guilty to the indictment and was sentenced to two years at hard labor. In these circumstances a plea of guilty in a criminal prosecution is admissable in a civil action concerning the same facts, and in competent evidence, though it is not conclusive on the issue to be decided. *Smith v. Southern National Life Ins. Co.*, 130 So. 2d 337 (La., 1961).

The Third Circuit, per Judge Tate, also confirmed this admissability in its decision of *Davis v. Bankston*, 192 So.2d 614 (La., 1966), decided the same day as *Roller v. Cormier*, supra, in which Justice Tate saw the admission as one against interest and therefore admissable.

Admittedly, in the case before the bar, is a verdict which indicates that the jury found Bruce Cleland negligent, but counsel for the petitioner was unable to question Mr. Cleland relative to the fixing of the ticket, which testimony would have carried certain weight as to his credibility and which certainly would have eliminated any consideration of contributory negligence on the part of Patricia Knight.

Bruce Cleland offered testimony that could have indicated contributory negligence on the part of Patricia Knight. His credibility was, therefore, in question. He had attempted to have a ticket "fixed". This propensity for attempted illegal activity is a proper matter for inquiry. Had this information been presented to the jury, his credibility would have been effected, the jury may not have believed him and the inferences to contributory negligence may have been expediently dismissed by the jury.

The Federal Rules of Evidence have not been silent on this position. Rule 608, paragraph b, states:

> Specific instances of conduct. Specific instances of conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testified to his character for truthfulness or untruthfulness.

The Advisory Committee's note at subdivision (b), paragraph (2):

> Particular instances of conduct, though not the subject of criminal conviction, may be inquired into on cross-examination of the principal witness himself or of a witness who testified concerning his character for truthfulness. Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently, safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time. Also, the overriding protection of Rule 403 requires that probative value not be outweighted by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment.

From these Rules and accompanying note we are able to see that the attempts by Mr. Cleland to have the ticket "fixed" was an area into which counsel for petitioner should have been permitted. It was relevant and bore important

weight as to the credibility of the driver on other points about which he would testify. It was important to the plaintiffs that the jury know that Mr. Cleland had fixed the ticket. The failure by the court to allow this testimony before the jury was a reversible error.

Mr. Cleland, was questioned by the judge, outside the hearing of the jury. He testified as to his attempts to have the citation "fixed". The court did not allow the testimony before the jury. The Court stated as its reasons:

> THE COURT:
>
> Gentlemen, under these circumstances, it seems that the Court's decision has been made simpler, in that it now appears that rather than having a guilty plea in the normal sense, we merely have the fixing of a ticket, so to speak.
>
> MR. CUMMINGS:
>
> Judge, I want the Court to know that until just now.....
>
> THE COURT:
>
> I understand that. Obviously, the witness just clarified it just now. On the basis of this, I think I'll have to sustain the motion. For this and the other reasons I have indicated, it is obvious that it is all the more untrustworthy. I don't think the action would be used against him under the circumstances and would even be more like actions of an officer.
>
> All right, get the jury. (Tr. 422-423)

Counsel for the plaintiff had sought to introduce this line of testimony, but was prohibited from doing so. This resulted in an injustice to the plaintiffs; the court erred in failing to allow plaintiffs to examine the driver relative to his "fixing" of the traffic violations.

Eventually, the verdict reached indicated that the jury would accept the theory pronounced by counsel for the defendant, Mr. Combe, and not that developed by the evidence and supported by the testimony of each plaintiff and Mr. Cleland.

Mr. Combe, in his closing remarks, would suggest how the accident occurred, wherein he would state:

> Unless Patricia Knight was in the process of passing the intersection, at which point she immediately stops trying to decide what to do, back up, turn around, or go completely around the block (Tr. 465).

This theory was totally unsupported by the evidence and, had the jury known of the guilty plea of Mr. Cleland, his credibility would have suffered. It was this decision by the Court which is reversible error and for which the petitioners are entitled to a new trial.

The Fifth Circuit Court of Appeal without reasons or support held that this proposition was "without merit". The Supreme Court must grant writs.

IV.

Petitioners submit that the Fifth Circuit procedure of

placing certain cases on the "Summary Calendar" denies to those litigants the right to the due process of the law, a Fifth Amendment guarantee. As this Court stated in *Federal Communications Commission v. W.J.R., The Goodwill Station,* 69 S.Ct. 1097, there was no right to oral argument as the appellant was not left without judicial remedy. However, in the case presently before the Court, the petitioners are left without any remedy, save this Court's action. The petitioners have had a trial, and have not been granted any oral argument, or proper access to the Appellate Courts since that trial. The right to oral argument is an inherent part of the appeal process. It has become dogmatic in our law that parties be treated equally before the law. The Fifth Circuit procedure is in obvious conflict with that philosophy. Can it be proper that one appellant will be granted the right to oral argument while another litigant is denied the right to orally explain his case and thereby highlight the particular points of review? The oral argument affords to the litigants an opportunity to answer questions from the Bench and fully explain and amplify his position.

The procedure of the Fifth Circuit Court of Appeal denies to litigants equality before the law and equal access to the due process of the law.

This Court has held that oral arguments are essential to a fair hearing, *Londoner v. Denver,* 210 U.S. 373, 28 S.Ct. 708, 52 L.Ed. 1103. Petitioners would suggest that oral argument is essential in this case and request this Court grant Writs of Certiorari to the United States Circuit Court of Appeal for the Fifth Circuit.

CONCLUSION

The decisions rendered in the instant case are inconsistent with the overwhelming weight of evidence presented at trial. The petitioners have sought judicial redress but it has been denied to them and it is now to this Court which petitioners must apply for justice.

Thus, it is submitted that this matter is now meriting this Court's attention and one proper for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JOHN J. CUMMINGS, III
200 Alison House
416 Gravier Street
New Orleans,Louisiana 70130
Attorney for Petitioners

CERTIFICATE

I certify that a copy of the foregoing Petition for Certiorari and accompanying brief has been served on opposing counsel of record, John Combe of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, 28th Floor, Louisiana & Southern Life Bldg., 225 Baronne Street, New Orleans, Louisiana, by depositing same in the U. S. Mail, postage prepaid, this 29th day of January, 1976.

JOHN J. CUMMINGS, III

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

FILED: December 12, 1974

Civil Action No. 74-1272, Section "I"

LOUISE KNIGHT, ET AL
versus
SOUTH CENTRAL BELL TELEPHONE COMPANY

JUDGMENT

Considering the verdict of the jury herein; and,

Considering the Judgment of the Court as to the third-party complaint;

And further considering the direction of the Court as the entry of judgment; accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, South Central Bell Telephone Company, against plaintiff, Joan Stevens, dismissing said plaintiff's suit, with costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the third-party demand of South Central Bell Telephone Company against Patricia A. Knight and H.L. Knight, Jr., be, and the same is hereby, dismissed as moot.

Dated at New Orleans, Louisiana, this 12th day of December, 1974.

/s/ Nelson B. Jones
NELSON B. JONES, Clerk

APPROVED AS TO FORM:

/s/ Jack M. Gordon
UNITED STATES DISTRICT JUDGE

* * * * * * *

John J. Cummings, III, Esq.

John C. Combe, Jr., Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

75-1631
(Summary Calendar*)

LOUISE KNIGHT, PATRICIA KNIGHT, wife of
HARRISON KNIGHT, JR.
Plaintiffs-Appellants,

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,
Defendant-Third Party
Plaintiff Appellee-
Appellant,

versus

HARRISON L. KNIGHT, JR., and PATRICIA KNIGHT,
Third Party Defendants
Appellees,

* * * * * * *

JOAN STEVENS,
Plaintiff-Appellant,

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,
Defendant-Appellee.

Appeals from the United States District Court for the
Eastern District of Louisiana
(August 19, 1975)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

---

*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et als., 5 Cir., 1970, 431 F.2d 409, Part 1.

PER CURIAM:

The three appellants in this diversity action sought recovery for personal injuries allegedly sustained when the automobile in which they were traveling was struck in the rear by a truck driven by an agent of defendant. The jury returned a verdict in favor of one of the appellants, a guest passenger. Concluding, however, that there existed no causal relationship between the accident and the injuries allegedly sustained by the second guest passenger, the jury declined to award her damages. The third appellant, the driver of the automobile, was also denied recovery, the jury having found her contributorily negligent.

Appellants here urge that the award of damages to only one of the two guest passengers is inconsistent, and that there was insufficient evidence to sustain the jury finding of contributory negligence on the driver's part. After a careful review of the record, we cannot conclude that the jury findings are unsupported by competent evidence.

In light of the jury finding that the agent of the defendant was negligent, appellants further contention that the trial court erred in excluding testimony relative to the driver's attempts to have a traffic citation "fixed" is without merit.

For these reasons the judgment of the trial court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-1631

LOUISE KNIGHT, PATRICIA KNIGHT, wife of
HARRISON L. KNIGHT, JR.,
Plaintiffs-Appellants,
versus
SOUTH CENTRAL BELL TELEPHONE COMPANY,
Defendant-Third Party Plaintiff-Appellee-Appellant,
versus
HARRISON L. KNIGHT, JR., and PATRICIA KNIGHT,
Third Party Defendants
Appellees.

* * * * * * * *

JOAN STEVENS,
Plaintiff-Appellant,
versus
SOUTH CENTRAL BELL TELEPHONE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING
(September 24, 1975)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.